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Refusal to Testify on Constitutional Grounds - Discharge from State Employment

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in so far as a college education is concerned?[13] Perhaps through the use of *Pass v. Pass*[14] and the other cases of the majority view it represents,[15] the courts will find themselves free to order a financially-able father to provide a college education to his minor child deserving of such an education when the parents are "happily" married.

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REFUSAL TO TESTIFY ON CONSTITUTIONAL GROUNDS — DISCHARGE FROM STATE EMPLOYMENT

Petitioner, a temporary county social worker,[1] refused to testify about his political beliefs and associations before a sub-committee of the House Un-American Activities Committee. His refusal to answer was based on the first and fifth amendments of the United States Constitution. Pursuant to the provisions of a California statute,[2] which required state employees to testify before any investigating body when so ordered, and which made any state employee who refused to do so guilty of insubordination, petitioner was summarily discharged.[3] The California Court of Appeals upheld the dismissal.[4] By certiorari, petitioner challenged the constitutionality of the statute, claiming it to be in violation of the fourteenth amendment of the United States Constitution; contending his discharge from state employment for the exercise of a federal right was a denial of due process of law. *Held, affirmed* (5-3),[5] the statute is a reasonable exercise of the power of the state to regulate and supervise the conduct of its employees. *Nelson v. County of Los Angeles*, 362 U.S. 143 (1960).

Prior to the last decade, the question of the power of the states to discharge employees who refused to testify before investigating committees and bodies had not been before the United States Supreme Court, although numerous state cases had dealt with the problem. The state courts, with a few notable exceptions,[6] have upheld such dismissals. Most

13. See text accompanying note 5 *supra*.
14. 118 So.2d 769 (Miss. 1960).
15. See note 6 *supra*.

1. The opinion of the Court deals with petitioner Globe, a temporary county employee, only. The decision of the state court as to petitioner Nelson, a permanent employee, was affirmed without opinion by an equally divided court. Mr. Chief Justice Warren did not participate.
2. Cal. Gov't Code § 1028.1 (1953).
3. Los Angeles County Civil Service Rules § 19.07. (temporary employees are subject to summary dismissal at any time during their probationary periods.)
4. Globe v. County of Los Angeles, 163 Cal. App.2d 595, 329 P.2d 971 (1958).
5. Mr. Justice Clark wrote for the Court. Mr. Justices Black, Brennan and Douglas dissented. Mr. Chief Justice Warren did not participate.
6. Board of Educ. v. Mass, 148 Cal. App.2d 392, 304 P.2d 1015 (1956) (summary dismissal of state employee, who refused to testify reversed); Opinion of the Justices, 332 Mass. 763, 126 N.E.2d 100 (1958) (advisory opinion holding unconstitutional a proposed statute to discharge employees who refuse to testify.)

of the state courts have not analyzed the question, but have relied upon an epigram of Justice Holmes, "Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[7] When the state courts have attempted to analyze the question, they have upheld such discharges on the ground that when duty and privilege conflict, the privilege must be abandoned.[8] This reasoning has been applied to uphold the dismissal of police officers,[9] teachers,[10] firemen[11] and other public employees[12] for the exercise of federal privileges, including refusals to testify, deemed inconsistent with the duty of public employment. One exception to this general rule is the refusal of the state courts to allow the disbarment of attorneys who refuse to testify before investigating bodies, despite the holding that attorneys, as officers of the court, are quasi-public officers.[13]

The United States Supreme Court has ruled that there is one limitation upon the power of the states to discharge employees who refuse to testify, either on first or fifth amendment grounds, before investigating bodies.[14] In *Slochower v. Board of Higher Education*,[15] the Court held that no inference of guilt could be drawn from the exercise of these constitutional privileges before a federal committee. The New York Court of Appeals had held that Professor Slochower's refusal to testify was the equivalent of his "resignation" and upheld his summary discharge from state employment.[16] The United States Supreme Court reversed, holding that his refusal to testify was converted into a conclusive presumption of

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7. McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

8. Christal v. Police Comm'n of San Francisco, 33 Cal. App.2d 564, 569, 92 P.2d 416, 419 (1939), "There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment."

9. Fraze v. Civil Service Bd., 170 Cal. App.2d 333, 338 P.2d 943 (1959); Christal v. Police Comm'n of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416 (1939); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); Canteline v. McClellan, 282 N.Y. 166, 25 N.E.2d 972 (1940); Souder v. City of Philadelphia, 305 Pa. 1, 56 Atl. 245 (1931); Brownell v. Russell, 76 Vt. 306, 57 Atl. 103 (1904).

10. Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267 (1952); Joyce v. Board of Educ., 325 Ill. App. 543, 60 N.E.2d 431 (1945); Faron v. School Comm. of Boston, 331 Mass. 531, 120 N.E.2d 772 (1954); Goldway v. Board of Higher Educ., 178 Misc. 1023, 37 N.Y.S.2d 34 (App. Div. 1942).

11. Bell v. District Court of Holyoke, 314 Mass. 622, 51 N.E.2d 328 (1943); People *ex rel.* Clifford v. Scannel, 74 App. Div. 406, 77 N.Y. Supp. 704 (Sup. Ct. 1902).

12. Hirschman v. Los Angeles County, 39 Cal.2d 698, 249 P.2d 287 (1952), *cert. denied sub nom.* Petherbridge v. Los Angeles County, 345 U.S. 1002 (1953); Koral v. Board of Educ., 197 Misc. 221, 94 N.Y.S.2d 378 (App. Div. 1950); Fitzgerald v. Philadelphia, 376 Pa. 379, 102 A.2d 887 (1954).

13. Sheiner v. State, 82 So.2d 657 (Fla. 1955); *In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941); Matter of Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940).

14. See generally PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT 48-54 (1958).

15. 350 U.S. 551 (1956). Mr. Justice Clark wrote for the Court, Mr. Justices Burton, Reed, Minton and Harlan dissented.

16. Daniman v. Board of Educ., 306 N.Y. 532, 538, 119 N.E.2d 373, 377 (1954), "The assertion of the privilege against self-incrimination is equivalent to a resignation."

guilt and that due process was violated by such an inference being drawn from the exercise of the constitutional privilege before a federal committee.[17] The Court held that before Slochower could be discharged by the state he must be given an opportunity to explain his refusal to testify before a state body.[18] In reaching this result the court carefully distinguished *Garner v. Board of Public Works*,[19] which upheld the power of the states to require a loyalty oath and affidavit as a condition of public employment. In distinguishing *Slochower* from *Garner*, the Court said that the states would be free to draw the necessary conclusions when employees refuse to testify before state committees examining their qualifications for office.[20] It was apparent that the Supreme Court had created a distinction between inferences that could be drawn from a refusal to testify before a state and a federal investigating body for purposes of discharge from state employment.

The lower federal courts have applied the "no inference" rule of *Slochower* to prohibit the federal government from withholding retirement pay to former employees who refused to testify before federal committees,[21] but have not applied the rule to alien deportation hearings.[22]

The "no inference" rule of the *Slochower* case was followed by the Supreme Court in *Konigsberg v. State Bar of California*[23] in which it held that a refusal to answer questions relating to political activities before the state bar examiners could not support an inference of "bad moral

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17. Slochower v. Board of Higher Educ., 350 U.S. 551, 557-559 (1956), "The privilege against self-incrimination would be reduced to a hollow mockery if the exercise could be taken either as equivalent to a confession of guilt or a conclusive presumption of perjury. . . . In practical effect the questions asked are taken as confessed and made the basis of the discharge. . . .

[T]he board seized upon his claim of privilege before the federal committee and converted it . . . into a conclusive presumption of guilt. Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight."

18. *Id.* at 558. "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. . . . The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive."

19. 341 U.S. 716 (1951) (upheld the power of the states to require a loyalty oath and affidavit as a condition of employment and to discharge employees who refuse to do so, even though such refusal was based on fifth amendment grounds).

20. Slochower v. Board of Higher Educ., 350 U.S. 551, 558 (1956), "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at the property, affairs or government of the city, or . . . official conduct of city employees. In this respect the present case differs materially from Garner."

21. Steinberg v. United States, 163 F. Supp. 590 (Ct. Cl. 1958).

22. Da Costa v. Holland, 151 F. Supp. 351 (E.D. Pa. 1958); Vlisidis v. Holland, 150 F. Supp. 678 (E.D. Pa.), *aff'd*, 245 F.2d 812 (3d Cir. 1957).

23. 353 U.S. 252 (1957). Mr. Justice Black wrote for the court, Mr. Justices Harlan and Clark dissented on the merits, Mr. Justice Frankfurter dissented on jurisdictional grounds.

character" as grounds for denying admission to the bar.[24] The inference held invalid in the *Konigsberg* case was drawn from a refusal to answer before a state committee, and it appeared the Court was extending the doctrine of the *Slochower* case to include state investigations.[25] The dissenting opinion of Mr. Justice Harlan argued that a state should be free to draw whatever inferences it desires when a state body is frustrated by a refusal of a witness to answer relevant questions.[26]

This apparent extension of the *Slochower* rule was soon to prove illusory, for the Court in later cases was to return to the federal-state distinction formulated in *Slochower* to uphold the dismissal of state employees. In *Beilan v. Board of Education*[27] and *Lerner v. Casey*,[28] the Court upheld the discharge of state employees who refused to testify before state investigating bodies on the grounds that the refusal was before a state, not a federal body. In *Beilan* a teacher was discharged for "incompetence," although his only dereliction from duty was refusing to testify before a state body. The court held that no inference of guilt was drawn from his refusal to answer; his refusal to testify was equated with "statutory incompetence." To justify the result the Court reasoned that Beilan was under a duty to cooperate; his lack of candor and frankness in refusing to testify constituted "incompetence," not his plea of constitutional privilege. The Court distinguished *Konigsberg* on the grounds that no inferences were drawn from Beilan's refusal to testify.[29] *Slochower* was considered inapplicable due to the state-federal investigation distinction.[30] In *Lerner v. Casey*[31] which had an analogous factual pattern, similar reasoning was employed by the Court to uphold a dismissal on grounds of "doubtful trust and reliability," although the sole basis for such a determination was the employee's refusal to testify before a state body. The Court also held in *Lerner* that a plea of the fifth amendment is not valid before a state body, thus Lerner's refusal to answer was

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24. *Id.* at 270, "Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or moral character in general if his refusal to answer was based on the belief that the United States Constitution prohibited the type of inquiry which the committee was making. . . . [I]t is our judgment that the inference of bad moral character which the committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted."

25. The *Konigsberg* case can be distinguished factually from *Slochower* and *Nelson*. However *Konigsberg* does hold that a state may not draw unfavorable inferences from a refusal to testify before a state committee.

26. 353 U.S. 252, 276 (1957) (dissent).

27. 357 U.S. 399 (1958). Mr. Justice Burton wrote for the Court, Mr. Chief Justice Warren and Justices Black, Brennan and Douglas dissented. Mr. Justice Frankfurter concurred.

28. 357 U.S. 468 (1958). Mr. Justice Harlan wrote for the Court, Mr. Chief Justice Warren and Justices Black, Douglas and Brennan dissented. Mr. Justice Frankfurter concurred.

29. Beilan v. Board of Educ., *supra* note 27 at 409.

30. *Id.* at 409 (quoting from Slochower, see note 20 *supra*).

31. Lerner v. Casey, 357 U.S. 468 (1958).

without legal basis and he was subject to discharge.[32] The state-federal distinction was also reaffirmed in *Lerner*.[33]

In the instant case[34] petitioner Globe did not contest his discharge on the grounds that he was denied a hearing before the local officials;[35] he argued that his discharge for "insubordination," based on his refusal to testify before a federal committee on constitutional grounds, constituted arbitrary and unreasonable state action. In upholding his dismissal, the Court held the federal-state investigation distinction of the *Slochower* case distinguishable on three grounds: (1) no inference of guilt was drawn by the state from the exercise of the constitutional privilege,[36] (2) Globe, unlike Slochower had been ordered by his superior to appear and testify,[37] (3) the California statute required state employees to testify before all investigating committees, state and federal.[38] In upholding the discharge, the Court reasoned that if Globe had not appeared before the committee at all his discharge would be valid; as the state drew no inference of guilt from his claim of constitutional privilege that claim could not be used to frustrate the power of the state over its employees.[39]

Mr. Justice Black, in dissent,[40] stated that the only basis for Globe's discharge was his refusal to testify before a federal committee under a claim of constitutional privilege. He argued that to allow a state to discharge an employee on such grounds is a violation of Article VI (Supremacy Clause) of the Constitution, as well as a violation of Fourteenth Amendment due process.[41]

Mr. Justice Brennan, also dissenting,[42] argued that *Nelson* should be controlled by *Slochower;* the two cases being indistinguishable and that the

32. *Id.* at 478 (citing Knapp v. Schweitzer, 357 U.S. 371 (1958), decided the same day as *Lerner*).

33. *Id.* at 477, "[I]n Slochower such a claim had been asserted in a federal inquiry having nothing to do with the qualification of persons for state employment, and the Court, in its opinion carefully distinguished that situation from one, where, as here, a State is conducting an inquiry into fitness of its employees."

34. Nelson v. County of Los Angeles, 362 U.S. 143 (1960).

35. Temporary employees are subject to summary discharge under Los Angeles County Civil Service Rules. See note 3 *supra*.

36. Nelson v. County of Los Angeles, 362 U.S. 143, 80 Sup. Ct. 527, 531 (1960), "The test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any "built in" inference of guilt in its statute, but solely on employee insubordination for failure to give information. . . . The fact that he chose to place his refusal on a Fifth Amendment claim put the matter in no different posture for . . . California did not employ that claim as the basis for drawing an inference of guilt."

37. *Id.* at 531, "[I]t must be remembered that here — unlike Slochower — the Board had specifically ordered the employees to appear and answer."

38. Cal. Gov't Code § 1028.1 (1953).

39. Nelson v. County of Los Angeles, 362 U.S. 143, 80 Sup. Ct. 527, 531 (1960).

40. *Id.* at 532 (dissenting opinion of Mr. Justice Black).

41. *Id.* at 532, "The Federal Constitution told Globe he could, without penalty, refuse to incriminate himself before any arm of the Federal Government; California however has deprived him of his job solely because he exercised this federal constitutional privilege. In giving supremacy to the California law, I think the Court approves a plain violation of Article VI of the Constitution of the United States which makes the Constitution "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

42. *Id.* at 532 (dissenting opinion of Mr. Justice Brennan).

constitutional infirmities that existed in the *Slochower* case were present in *Nelson*. Mr. Justice Brennan stated that the distinction made by the Court, that Globe was discharged for "insubordination" and Slochower discharged because of an inference of guilt arising from his refusal to answer was without merit. He contended that the New York court in *Slochower* had treated the refusal to testify as a "resignation" in the same manner as the California court had treated the refusal to testify as "insubordination," and that the Supreme Court in *Slochower* had recognized that "only in practical effect that the questions asked were taken as confessed."[43] Mr. Justice Brennan stated that the same arbitrary unfitness for office was drawn by the California court in *Nelson* as by the New York court in *Slochower*.[44]

The majority of the court, in upholding Globe's dismissal, held that *Beilan* and *Lerner* controlled, and that the state could equate a refusal to testify before a federal committee with insubordination, in the same manner that it could equate a refusal to testify before a state committee with "incompetence"[45] or "doubtful trust and reliability."[46] In reaching this conclusion, the Court disregarded the dictum of the *Lerner* and *Beilan* cases which allowed such conclusions since the Court presumed that the state investigation was for the purpose of inquiring into the fitness of the state employee to hold his office. No such purpose has ever been the reason for the investigation of the House Un-American Activities Committee.[47] Thus, the result in the instant case hinged upon the validity of the previously formulated federal-state investigation distinction, and here considered inapplicable. In rejecting this distinction, originally drawn in *Slochower* and restated in *Beilan* and *Lerner*, the Court stated that since the California statute required its employees to testify before all investigating bodies the distinction was not applicable. It is submitted that this reasoning is questionable. The New York court in *Slochower*, by affirming Slochower's dismissal, had held the New York statute applicable to federal as well as state investigation. The fact that the California statute by its wording required such testimony, while the New York statute by its interpretation so required should not be considered determinative for due process considerations.

It is difficult to imagine two cases more factually identical than *Nelson* and *Slochower*. If the court did not intend to reverse the *Slochower* decision, then it has been limited to the extent of being impliedly overruled. If, as the Supreme Court has said, "Constitutional protection does extend to the public servant whose exclusion pursuant to a statute

43. *Id.* at 534.
44. *Ibid.*
45. Beilan v. Board of Educ., 357 U.S. 399 (1958).
46. Lerner v. Casey, 357 U.S. 468 (1958).
47. Nelson v. County of Los Angeles, 362 U.S. 143, 80 Sup. Ct. 527, 534 (dissenting opinion of Mr. Justice Brennan).

is patently arbitrary or discriminatory"[48] and "to state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful and non-discriminatory terms laid down by the proper authorities,"[49] then the dismissal of Globe should have been reversed as a denial of due process of law upon the authority of *Slochower*.

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48. Wieman v. Updegraff, 344 U.S. 183, 192 (1952).
49. Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956).